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Corporate Excise

University of Massachusetts
Depository Copy**DOR Directive 95-7**Massachusetts
Department of
Revenue**Foreign Corporations Using Massachusetts Roads to Transport Goods:
What Constitutes Substantial Nexus?****Introduction:**

A foreign corporation which frequently uses Massachusetts roads to transport goods has nexus for corporate excise purposes and must file a Massachusetts corporate excise return and apportion income to Massachusetts. Such corporations include, but are not limited to, corporations which deliver goods for other businesses, such as motor carriers, or corporations which use Massachusetts roads to deliver their own goods. The purpose of this directive is to quantify the frequency of use of Massachusetts roads during a tax year which will create substantial nexus for corporate excise purposes.

Issue:

When a foreign corporation uses Massachusetts roads to transport goods, what is the threshold level of activity which will create substantial nexus?

Directive:

A foreign corporation which uses Massachusetts roads to transport goods will have substantial nexus for corporate excise purposes if, during the course of the tax year, it:

- (1) makes more than twelve pickups, deliveries, trips through Massachusetts without pickup or delivery, or any combination thereof totaling more than twelve, or
- (2) is otherwise doing business in Massachusetts.

As illustrated in the examples below, a pickup and delivery of goods at the same time and location in Massachusetts is counted as one event. A trip through Massachusetts without pickup or delivery of goods is defined as any use of the Massachusetts roads which generally begins when a motor vehicle enters Massachusetts and ends when the vehicle leaves Massachusetts.

Discussion of Law:

Generally, a corporation that wishes to fill an order for the sale of tangible goods in Massachusetts by truck from a point outside the state has the option of using a motor carrier¹ or making delivery in the corporation's private vehicles.² The Department's regulation on Corporate Nexus, 830 CMR 63.39.1(10) concludes that a corporation whose trucks "frequently transport goods over the roads of Massachusetts" has substantial nexus for corporate excise purposes. Also see Letter Ruling 83-93. However, neither the regulation nor the ruling defines the level of activity which constitutes "frequent" use of Massachusetts roads and therefore creates substantial nexus for corporate excise purposes.

When reviewing the constitutionality of state taxes, the Supreme Court has applied a four-pronged test. Under that test, a tax is valid if it is applied to an activity with a substantial nexus to the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services pro-

vided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The requirement of "substantial" nexus recognizes that some activities are too trivial or incidental to create a connection with the taxing state. The Supreme Court has held that more than a "slightest presence" is constitutionally required in order to create corporate nexus. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). The Supreme Court has also recently ruled that some de minimis standard is required in determining what activities beyond those protected by P.L. 86-272³ will create corporate nexus. *Wisconsin Department of Revenue, Petitioner v. William Wrigley, Jr. Co.*, 112 S.Ct. 2447 (1992).

Although, the extent of contacts with a state required to form substantial nexus is a factual determination which generally must be made on a case-by-case basis, the Department is issuing this directive to set clear standards for certain activities of foreign corporations, which in the Department's opinion, lend themselves to the application of a quantitative standard. This directive applies only to the corporate excise obligations of foreign corporations whose sole unprotected activity in the state is the use of Massachusetts roads to transport goods, as described herein. Other activities performed in Massachusetts may create substantial nexus when performed fewer than twelve times per year. Examples of such other activities include, but are not limited to, those described in the Department's regulation on Corporate Nexus, 830 CMR 63.39.1(4) and 830 CMR 63.39(5)(d). In particular, the twelve-trip rule stated in this Directive does not apply to corporations that install or supervise the installation of the goods they deliver in Massachusetts.

Examples:**Example 1**

Gardenco Inc. (Gardenco), a dealer in large garden equipment located in New Hampshire, sells to landscape and garden contractors as well as to retail stores. When Gardenco delivers a new machine to a customer, it may also pick up one or more used machines, in trade or for overhaul and repair, or both. During a tax year, Gardenco's trucks traveled to Rhode Island four times. Each of those times, its truck traversed Massachusetts roads going southbound to Rhode Island and traversed Massachusetts roads going Northbound on its return to New Hampshire. During the course of the tax year, Gardenco also made three deliveries to Massachusetts customers and, at the same time, picked up equipment from each of these three Massachusetts customers. Gardenco was not otherwise doing business in Massachusetts. Gardenco does not have substantial nexus for corporate excise purposes, since the combination of eight trips through Massachusetts without pickup or delivery, plus pickups and deliveries at three locations totals eleven. Therefore, Gardenco is not required to file a Massachusetts corporate excise return for this tax year.

Example 2

During a tax year, Gardenco (described in Example 1) sent its truck to Massachusetts twice, in May and November, to deliver and pick up garden equipment. On the May trip, it delivered equipment to seven Massachusetts branch locations of a home improvement store. On the November trip, it picked up unsold equipment at the same seven branch store locations. Gardenco was not otherwise doing business in Massachusetts. Since the combination of pickups and deliveries at fourteen locations during the tax year exceeds the threshold, Gardenco has substantial nexus and must file a Massachusetts corporate excise return for this tax year.

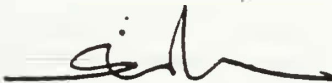
Example 3

Mid-Atlantic Trucking, Inc. (Mid-Atlantic) is a motor carrier incorporated in Delaware. During a tax year, Mid-Atlantic's trucks made seven round trips from Baltimore to Albany. On six of the trips, Mid-Atlantic's truck traversed Massachusetts twice. On one trip the truck traveled through Massachusetts on the way to Albany, but returned to Baltimore by a route outside of Massachusetts. Mid-Atlantic was not otherwise doing business in Massachusetts. Since Mid-Atlantic's trucks have made a total of thirteen trips on Massachusetts roads, the corporation has

substantial nexus and must file a Massachusetts corporate excise return for this tax year.

Example 4

Home Furnishings, Inc. (Home Furnishings), a Rhode Island corporation, makes ten deliveries of furniture to customers in Massachusetts during the tax year. The corporation's only other activities in Massachusetts are protected solicitation under P.L. 86-272. Home Furnishings' trucks have made no other use of Massachusetts roads and the corporation has engaged in no other unprotected activity in the state. Since the vendor has only made ten deliveries in Massachusetts during the course of the tax year, this unprotected activity is considered de minimis for corporate excise purposes. Home Furnishings is not required to file a Massachusetts corporate excise return for this tax year.



Mitchell Adams
Commissioner of Revenue
July 12, 1995

1. A motor carrier means any business entity that engages in the carriage of passengers or freight for compensation, on the public roads or highways. See 830 CMR 63.38.3. This term generally encompasses "for-hire" carriers such as common carriers and contract carriers as defined in the Interstate Commerce Act. See 49 U.S.C. §§ 10102(14), 10102(15), 10102(16)(B).

2. See definition of motor private carrier in 49 U.S.C. 10102(17).

3. P.L. 86-272, 15 U.S.C. § 381, prohibits a state from taxing the income of a corporation whose only business activities in the state consist of "solicitation of orders" for tangible goods, provided that the orders are sent outside the state for approval and the goods are shipped or delivered from out-of-state.